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OCTOBER 25. 1770.

INFORMATION

F O R

Mrs JEAN KER, Daughter of the deceased
Lord MARK KER, Pursuer,

A G A I N S T

ALEXANDER Earl of HOME, Defender.

THE pursuer having let a house and furniture, belonging to her, in Upper Brook-street, Grosvenor-square, London, to the deceased William Earl of Home, at the rent of L. 150 Sterling yearly for the house, and what should be judged reasonable for the furniture. The said Earl did enter to, and possess the said house and furniture from midsummer 1752 to Ladyday 1756, being three years and nine months, extending in whole to the sum of L. 750 Sterling.

The pursuer also paid a year's rent of a coach-house for the Earl, being L. 6 Sterling; of which sums she received, at different times, the sum of L. 300 Sterling; so that there remained due of the said rents the sum of L. 456 Sterling.

There were, in the said house, three pictures belonging to the pursuer, which the Earl carried away with him when he left the house in the 1756.

The Earl having gone abroad to Gibraltar, (without paying the pursuer the foresaid balance of rents, and the price of the pictures), where he died in the year 1761, the pursuer brought an action, in the court of King's-Bench, against Elisabeth Countess-dowager of Home, widow and administratrix of the said deceased Earl, in October 1763, for payment of the said balance of rents, and price of the pictures. In this action comparance was made for the Countess, and it was pleaded for her, that the whole effects of her deceased husband administered by her, were not sufficient to pay the preferable debts which she condescended upon; and therefore she fell to be assolized from the pursuer's action.

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The pursuer finding, that she could not make the Countess liable in payment of her claim, applied to Alexander now Earl of Home for payment, and produced to him the late Earl's letters, and such instructions of her debt as were in her hands; with which his Lordship appeared at the time to be satisfied. But having shifted to make payment for several years, the pursuer brought an action before the court of session in the 1767, against the said Earl, as representing his deceased brother, concluding for payment of the sum of L. 450 Sterling, as the balance of the rent of said house and furniture, L. 6 as the rent of the coach-house, and L. 62, 10 s. Sterling, as the price or value of the pictures, or to restore the pictures in the same condition they were delivered to his brother, with the legal interest of the said several sums, *nomine damni*.

This action came in course before the Lord Justice-Clerk Ordinary; and the pursuer having given in a particular condescendence of the facts she was to insist upon, in support of her libel; and having also produced therewith sundry letters wrote by the late Earl to Miss Ker, which tended to instruct his possession of the house and furniture, and his carrying off the foresaid pictures along with him, the defender was appointed to give in answers to the said condescendence.

No answers having however been given in, it was, at a calling of the cause, represented, on behalf of the pursuer, that it was proved by the late Earl's letters produced, that he had possessed the house libelled from midsummer 1752 to Ladyday 1756; and that the rent thereof was L. 150 Sterling; and therefore insisted to have decreet for the said rent: and craved to be allowed a farther proof with respect to the rent to be paid for the furniture; as also to be allowed to prove, that the three pictures libelled were taken away by the late Earl; and value thereof; and that the pursuer had paid L. 6 as a year's rent of a coach-house for the Earl: and the

Mar. 9. 1768. Lord Ordinary, of this date, pronounced the following interlocutor: " Having considered what is above set forth, finds it
 " proven, that the late Earl of Home possessed the house libel-
 " led from midsummer 1752 to Ladyday 1756, being three
 " years nine months, at the yearly rent of L. 150 Sterling; and
 " decerns therefor, superseding extract till the 14th of June
 " next; allows the pursuer to prove the yearly rent or value of
 " the possession of the furniture, and what other people have
 " paid

"paid her as the rent of the same furniture; as also, that the late Earl took from her house the three pictures libelled, and value thereof; and that she paid L. 6 Sterling for one year's rent of the said coach-house; and grants commission," &c.

This proof was accordingly led, and reported; but before the same was advised by the Lord Ordinary, a representation was preferred on behalf of the defender, in which he contended, *1mo*, That the claim was cut off by the statute of limitations; and, *2do*, That as this was a debt contracted in England, and as by the law of England debts of this nature are only chargeable upon the personal estate or effects of the debtor, and not upon the heir in the real estate, that therefore the defender, who only represented his brother as heir in his real estate, could not be made liable in payment of the present claim; and, *3tio*, That as the pursuer was insisting for her payment against Lady Home in the court of King's-Bench in England, that therefore she could not insist for payment of the same debt against the defender, before the court of session in Scotland.

Answers were put in to this representation; and the Lord Ordinary, upon advising thereof, together with the proof that had been adduced, of this date, pronounced the following interlocutor: "Having considered this representation, with the answers thereto, refuses the desire of the representation, and adheres to the interlocutor complained of; and having advised the report of the act and commission, issued in pursuance of the interlocutor dated the 9th of March last, finds it sufficiently proved, that the late Earl of Home was bound to pay to the pursuer, over and above the rent of the house libelled, a yearly sum in consideration of the furniture which was in the house; and finds, from the said report, that L. 50 *per annum* was a reasonable consideration for the use of the said furniture; and therefore decerns the defender to make payment to the pursuer of the said sum of L. 50 Sterling yearly, and proportionally for the three years and nine months, during which the late Earl possessed the said house and furniture; and also finds it proved, That the said William Earl of Home did, at the time of his leaving the pursuer's house, carry with him the three pictures libelled, the value of which he agreed to pay to the pursuer; and finds it proved, from an account produced, signed *A. Botbwell*, that these three pictures cost the pursuer's father, in the year 1744, L. 60 Sterling; and

Nov. 22. 1768.

“ and that they were thought to be cheap bought; and that
 “ Mr Bothwell was bound to repay that sum whenever the pur-
 “ fuer’s father chused to return these pictures; and therefore
 “ decerns the defender to make payment to the pursuer of the
 “ above sum of L. 60 Sterling, as the price of these three pic-
 “ tures: finds no sufficient evidence to support the article of
 “ coach-house rent, mentioned in the libel; and therefore af-
 “ foilzies the defender from that article; and decerns the de-
 “ fender to make payment to the pursuer of the sums found
 “ due by this and the interlocutor of the 9th of March last, de-
 “ ducing therefrom L. 300 Sterling, acknowledged by the pur-
 “ fuer to have been received from the late Earl in part-pay-
 “ ment of said rents; and finds her intitled to no interest upon
 “ the balance of rents found due to her, nor to any expence
 “ of process; and affoilzies from these articles of the libel, and
 “ decerns.”

The pursuer represented against the foresaid interlocutor, in so far as it affoilzied the defender from the claim of interest and expences; and this representation was appointed to be seen and answered. The defender likewise represented against the interlocutor; in which he very slightly touched the defences he had stated in his former representation; and, without seeming to dispute the sufficiency of the proof of the late Earl’s having truly possessed the house and furniture in question, he rested his defence chiefly upon the triennial prescription established by the statute 1579.

Answers having been put in to this representation, the Lord Ordinary made avifandum with the representation and answers to your Lordships, and appointed parties to give in informations. In obedience to which, this is humbly offered on behalf of the pursuer.

The pursuer shall, in the *first* place, lay before your Lordships the evidence that has been adduced in support of her libel; and shall then proceed to consider the relevancy of the defences that have been offered against it.

With respect to the set of the house and furniture, and the rents payable for the house, the pursuer apprehends it is sufficiently instructed by the late Earl’s letters produced in process.

June 4. 1752.

In a letter of this date, the Earl writes the pursuer as follows:
 “ Dear Miss Ker, You have all the reason in the world to think
 “ me a very good-for-nothing fellow, for having been so long
 “ of

“ of answering your letter of the 9th May; but when I tell
 “ you, that I have not been twenty-four hours at the same
 “ place since the 19th, I flatter myself you will be so good as
 “ forgive me. I am extremely obliged to you for your very
 “ genteel offer of letting me either have the house, or not; and
 “ I shall most sincerely tell you my own opinion: I think to have
 “ the house of all things; and if it were equally convenient for
 “ you, should be glad to purchase it; but as it is a question
 “ whether that would be for your advantage, if you approve of
 “ it, I shall take it this next winter, just as it stands, and pay
 “ you L. 150 for the house, and the price that is thought reason-
 “ able for the use of the furniture; and when I am in town in the
 “ winter, you and I shall come to a final conclusion, whether I
 “ shall have a lease, purchase it, or in whatever other shape we
 “ shall agree. If you approve of this proposal, be so good as
 “ let me know; and there is no necessity of any body’s know-
 “ ing what agreement we have made,” &c.

That the Earl’s offer was accepted of, and that he had accordingly entered to, and possessed the house, and continued in it till May 1755, at which time he likewise agreed to continue in it for another year, is instructed by a letter from the Earl to the pursuer, of this date, in which he writes as follows: “ Dear May 2., 1755.
 “ Miss Ker, I received yours, of the 26th of October, last night;
 “ and am sorry that you should have misunderstood me so far
 “ as to imagine I was disobliged at what you wrote about the
 “ house. So far from it, it gave me pleasure, as I was sensible
 “ an offer such as you mention, was an extreme good one for
 “ you; and I must once more beg that you will believe me very
 “ sincere, when I tell you that I shall always be glad of what
 “ can be of advantage to you. *As I find by yours, that you do*
 “ *not know of a tenant just now, I shall keep it for one year longer, and*
 “ *hope before that is over, the person who has made you the*
 “ *offer and you will have settled your lease, &c.* I find that
 “ you have wrote to Mr Bothwell, desiring him to take the four
 “ pictures in the dining-room, at a price I am sure any body
 “ who is to have that house, would rather give than let them
 “ go. If Mr Bothwell is to have them, there is a necessity for
 “ that room, and indeed the whole house, being painted. If
 “ Mr Bothwell does not accept of your offer of the pictures,
 “ and they will fit the house I shall go in to midsummer come
 “ a year, I shall be glad to have them,” &c.

May 25. 1756.

Of this date the Earl wrote the pursuer as follows: "Dear
 " Miss Ker, It certainly must appear very odd to you, that I
 " should have left London, without asking your commands,
 " and settling our little affairs; but the truth is, that I was so
 " much hurried, from the time that I had orders to come down
 " here, that I hardly knew whether I stood on my head or my
 " heels: I hope however it will be no great inconveniency to
 " you to delay it for a little while. You was so good as to
 " say, that I might have any furniture I wanted: I shall be
 " obliged to you, if you will let me have the chest of drawers
 " in the room where I sat in a morning, as my papers are all
 " there, and I had no time to take them out before I set out.
 " As to the pictures in the dining-room, I have ordered my
 " upholsterer to see if they can be disposed of in the house I
 " go to. If they can, I shall most willingly take them; but
 " as I have forgot what is the price of Lord and Lady Ancrum,
 " and the copy of Rubens, must beg to know it."

Eleanor Wheeler depones, "That she, this deponent, lived
 " servant-maid with the late Lord Mark Ker, father of the said
 " Mrs Jean Ker the pursuer, for seven years before the time of
 " his death, which was in or about the month of February
 " 1752: That the said Mrs Jean Ker having soon thereafter let
 " the said Lord Mark Ker's house in Brook-street, Grosvenor-
 " square aforesaid, with the furniture therein, to the late Wil-
 " liam Earl of Home, this deponent, with the leave and appro-
 " bation of the said Mrs Jean Ker, engaged herself as a servant-
 " maid to Lord Home; and his Lordship having come into the
 " said house at midsummer 1752, the deponent lived there
 " with his Lordship, as his servant, from that time till mid-
 " summer 1756, when his Lordship quitted the house, and
 " moved to the Earl of Loudon's house in Privy-garden, White-
 " hall."

* Mary Britten, after setting forth, that before her marriage
 she lived a servant-maid with Miss Ker, depones, "That she
 " knows that the pursuer, after the death of the late Lord Mark
 " Ker her father, let her said father's house, in Brook-street,
 " Grosvenor-square, to the late Earl of Home, with the furni-
 " ture; and that his Lordship possessed the same for some
 " years."

And as to what was a suitable rent for the furniture, Wil-
 liam Masters depones, "That he, this deponent, in the lifetime
 " of

“ of the late Lord Mark Ker, used to be employed as his up-
 “ holsterer; and some time after the said Lord Mark Ker’s
 “ death, his daughter Mrs Jean Ker, the pursuer, desired
 “ this deponent to take a view of the furniture in his late
 “ house in Brook-street, Grosvenor-square, and let her know
 “ the value of it, in order, as the deponent then under-
 “ stood, that she might judge what to ask by the year for the
 “ use of the furniture from any tenant to whom she might let
 “ the house and furniture together: and deposeth, That he,
 “ this deponent, did accordingly view the furniture, and that
 “ in his judgement it was of the value of L. 500 Sterling; of
 “ which the deponent informed the said Mrs Jean Ker, and
 “ told her that the customary rule was to get ten *per cent.* for
 “ the use of such furniture as this was, being second-hand fur-
 “ niture; although sometimes twenty *per cent.* had been given
 “ for the use of new furniture; and the deponent afterwards
 “ understood, that the said Mrs Jean Ker had let her said fa-
 “ ther’s house and furniture to the late Earl of Home, who the
 “ deponent has heard was to pay her L. 150 a year, as rent for
 “ the house itself, and L. 50 for the furniture.”

And as to Lord Home’s carrying the pictures along with him,
 the foresaid Eleanor Wheeler depones, “ That when Lord Home
 “ quitted the pursuer’s house, and went to Lord Loudon’s
 “ house, the three pictures above mentioned were, by Lord
 “ Home’s order, moved and carried to Lord Loudon’s; and
 “ this deponent saw them there.” And Mary Britten depones,
 “ That she has heard and believes, that when Lord Home quit-
 “ ted the pursuer’s house, the said three pictures were carried
 “ away by his order to the house in Privy-garden, where his
 “ Lordship moved to.”

And for instructing the value of said pictures, there is an ac-
 count produced, amounting to L. 76 Sterling, by Lord Mark
 Ker, to A. Bothwell; to which is subjoined the following
 obligation: “ I hereby oblige myself to return the above L. 76
 “ for the above pictures, at any time when my Lord Mark Ker
 “ shall require it. (Signed) A. BOTHWELL. London, 20th
 “ May 1744.”

*Said before to
be £. 60.*

And Samuel Cook depones, (the foresaid accounts and obli-
 gation being produced to him,) “ That he this deponent verily
 “ believes the said paper-writing is the original account of the
 “ prices and money stated by the said Mr Bothwell to the said
 “ Lord.

“ Lord Mark Ker, for the pictures therein mentioned; and that
 “ the articles therein stated are the prices which the said Lord
 “ Mark Ker paid for the same; and the deponent hath heard
 “ several times the pictures were thought to have been bought
 “ at a very low price, and were worth much more.”

The pursuer humbly apprehends, that by the evidence above stated the pursuer's libel is clearly instructed, in so far as respects the articles which were sustained by the Lord Ordinary's interlocutor. The set of the house and furniture, and the rent payable for the house, independent of the parole-evidence, are sufficiently ascertained by the Earl's own letters. It is farther ascertained by these letters, that, besides the L. 150 payable for the house, the Earl was to pay, for the use of the furniture, what sums should be thought reasonable; and it appears from the oath of William Masters, that the sum charged for the use of the furniture is very reasonable. That the Earl carried away the three pictures, is clearly instructed by the oaths of the two servant-maids; and that the price charged for them is extremely reasonable, appears from the oath of Samuel Cook; and which indeed is no more than Mr Bothwell was bound to pay by the foresaid obligation, upon returning the pictures to him.

The defender was pleased to alledge, that the pictures are overcharged; and he culls out three articles from Mr Bothwell's obligation above recited, amounting to L. 38 Sterling; which he says comprehends all the pictures that Lord Home carried off. But your Lordships will observe, that other articles of the account also refer to these very pictures. Thus, there is an article of L. 14 for two whole length frames, that plainly belongs to the pictures of Lord and Lady Ancrum; and there is another article of 10 guineas, for cleaning, mending, and new lining those very pictures: In short, the whole account, which amounts to L. 76, relates to these very pictures Lord Home intromitted with, except one article of L. 3, and another of 10 guineas.

As therefore there can be no doubt, that the above articles of the pursuer's libel are sufficiently instructed, the only thing that remains to be considered is, the relevancy of the defences which have been offered on behalf of the Noble Lord.

In his last representation to the Lord Ordinary, he seemed to rest his defence upon the triennial prescription, established by act 83. parliament 1579. It was said, that the Earl removed from the pursuer's house in the 1756; that he lived down till the 1761; and

and that the present action was brought no earlier than the 1768: so that the triennial prescription was run four times over before the present action was commenced; and that therefore the claim must be cut off, unless resting owing can be instructed by writ or oath of party.

The pursuer does verily believe, that if she was obliged to have recourse to the Noble Lord's oath, in support of her libel, that her claim would be very safe, as his Lordship must be satisfied, that the claim is still resting. The late Earl's absence from England, till the time of his death, renders it pretty evident, that the debt was not paid by him before his death; and the defender himself does not pretend to say, that it has been paid by him: on the contrary, the defences which he has urged in the course of this action, are altogether incompatible with the idea of his having made payment. It has been pleaded for him, That this debt having been contracted in England, he, as heir to his brother, is not liable for it. Under these circumstances, this defence of prescription cannot appear in the most favourable light; and the pursuer is humbly persuaded, that it will likewise appear to your Lordships not to be founded in law.

In the *first* place, The pursuer does, with submission, apprehend, that as the debt pursued for was contracted in England, and where the creditor had her constant residence, that it cannot be affected by the triennial prescription introduced by the statute 1579.

It is a clear principle of law, That deeds executed in conformity with the law of the place where they are granted, shall be sustained, although they may be defective in the solemnities or formalities required by the law of the place where they are made the ground of the action. This is founded in public expediency. It cannot be known at all times, in what corner of the world a party to a deed may take up his residence, or to what particular jurisdiction he may be subject, when it shall become necessary to maintain an action against him upon such deed: It is therefore sufficient, that it be executed according to the law of the place where it is made. It is effectual there from the beginning; and it would be absurd to suppose, that the debtor, by changing his residence, should have it in his power to free himself of an obligation which, without his doing so, must have remained binding upon him.

And such being the rule with regard to the constitution of
C obligations,

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It is a clear principle of law, That deeds executed in conformity with the law of the place where they are granted, shall be sustained, although they may be defective in the solemnities or formalities required by the law of the place where they are made the ground of the action. This is founded in public expediency. It cannot be known at all times, in what corner of the world a party to a deed may take up his residence, or to what particular jurisdiction he may be subject, when it shall become necessary to maintain an action against him upon such deed: It is therefore sufficient, that it be executed according to the law of the place where it is made. It is effectual there from the beginning; and it would be absurd to suppose, that the debtor, by changing his residence, should have it in his power to free himself of an obligation which, without his doing so, must have remained binding upon him.

And such being the rule with regard to the constitution of
C obligations,

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obligations, it seems, with submission, to follow of course, that when questions occur with regard to their subsistence, the law of that country only where they are executed should be regarded, however different it may be from the practice or law of the country where such questions come to be determined. Thus, although by the law of Scotland, payment of a bond cannot be proved by witnesses, yet the payment of a foreign bond was found probable by witnesses, being according to the law of the place where the debt was contracted, 16th November 1626, Galbraith *contra* Cuninghame;—21st February 1633, Laird of Balbirnie *contra* Laird Erkle;—7th February 1634, Hyde *contra* Williamson;—and, 10th January 1702, Chatta *contra* Orde. And in the case Macmorran *contra* Melvil, 28th June 1626, collected by Lord Stair, the cedent's oath was found good against the onerous assignee, the bond being executed in England, after the English form, and assigned also there; though it was argued, that the assignation was according to the Scots style, and the debtor, though residing in England, was a Scotsman, and knew the custom of Scotland.

From the premises, it, with submission, seems to follow, that every question relative to the endurance of obligations, must depend upon the *lex loci contractus*; and that unless the law of that country has imposed a limitation which would bar an action in the courts of that country, the person who is sued in another country to which he has retired, ought not to be allowed to benefit himself by any prescription which prevails there. Limitations of actions are altogether local and municipal, and derogatory of the common law of nations. They ought not therefore to take place against strangers, who must be supposed entirely ignorant of them; and who, when they entered into the contract, could not be expected to have it in view, that they might be obliged to resort to a foreign court, in order to compel performance of the obligation undertaken by the person with whom they were dealing. If the obligation be still in force in the country where it was entered into, it would, with submission, be unjust to allow the debtor to acquit himself of that obligation; by stepping with his effects into another country, where the like obligations were limited to a shorter endurance.

The doctrine now pleaded for the pursuer, seems to have been established by the court in sundry instances: Thus, in the case

case of Sufannah Philips and John Short, against James Stamford of New-mills, 11th January 1695, observed by Lord Fountainhall, the defence of the triennial prescription was repelled in an action brought by certain English merchants against the heir of Sir James Stamford, for furnishings made to Sir James at London. And in the case, the assignees of Thomas Foukes *contra* Aikenhead, November 1731, in a pursuit for an account of drugs furnished from year to year by a druggist at London to an apothecary at Edinburgh, the Lords repelled the defence of the triennial prescription; and found, that the matter must be regulated by the act of limitation in England, being the *locus contractus*, and not by the act concerning prescription of accounts made in Scotland,

The opinion of Sir George Mackenzie seems to be agreeable to those decisions. In his observations upon the statute 1579, he says, "It may be doubted whether this act, ordaining merchants accounts to prescribe in three years, doth reach to counts owing to strangers; for they seem not obliged to know our law; and this would ruin all commerce, *et locus contractus semper attendendus*."

The defender, in this case, laid his chief stress upon a decision lately pronounced by the court, *viz.* John Randal against the executors of the deceased Captain Peter Innes; where the claim of Randal, which was founded on furnishings made by him in the course of his business as a merchant-taylor to Captain Innes at Woolwich, was found to be cut off by the triennial prescription.

But the pursuer does, with submission, apprehend, that the judgement which was there given will by no means apply to the present case. If the pursuer is rightly informed, that decision proceeded upon a specialty which does not here occur. Captain Innes had resided in Scotland entirely for many years before his death: hence he could only be pursued before a Scotch court, and according to the law of Scotland. The pursuer has been informed, that it was upon this specialty the judgement did proceed. It was considered that the creditor, when he saw his debtor fixed in Scotland, *animo remanendi*, was in some measure bound to take care to bring his action before any statutory prescription should take place, from the time of his fixing his abode there. With this view it was, that, in that case, a particular

1731 was a
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Dict. vol. 1.
p. 322.

particular condescendence of Captain Innes's places of residence was ordered to be given in; and from the time it appeared, that he had resided in Scotland for a period, preceding his death, much longer than was sufficient to found the defence of the triennial prescription.

Whereas, in the present case, this specialty does by no means occur. The late Earl of Home was not in Scotland from the period of these contractions to his death in the 1761; and the triennial prescription, when computed from the time of his death, was interrupted by the action which was brought at the pursuer's instance against the Earl's widow and executrix in the 1763; as it is a clear and undeniable proposition, that an action commenced against the executor, or any other representative of the defunct's, is a proper document taken upon the debt, and which must be sufficient to preserve it, and keep it alive, against the whole of the defunct's representatives.

Where the debtor, in a foreign contraction, retires to Scotland; and lives there during the period of the prescription, there may be good grounds in that case for finding the debt cut off by the prescription established by the law of Scotland. Where the debtor has resided in Scotland, and can only be prosecuted there, it is the duty of the creditor to inform himself of the law of that country. And it is not to be presumed, that he will allow his claim to lie over, without making any legal demand, during the whole period of prescription, as established by the law of the country of his debtor's residence, and where alone he can force payment. Under such circumstances, payment may properly be presumed, from so long a silence, unless this presumption be taken off by the writ or oath of party. But where the debtor, in a foreign contraction, is not residing in Scotland; so, as long as the obligation remains in force, not only by the *lex loci contractus*, but likewise of the debtor's residence, it would, with submission, be unjust to allow the debtor to acquit himself of the debt, barely by stepping into Scotland with himself and his effects. As long as Lord Home lived, as he never resided in Scotland, it is plain, that he could have been made liable in this debt; and it would, with submission, be absurd to suppose, that, notwithstanding, he could lawfully have been made liable in payment of the debt; that, at the same time, your Lordships should have found that the debt was prescribed, if an action had been

been brought against him in his own lifetime in this court; and therefore, the pursuer does humbly apprehend, and submits it to your Lordships, that as the debt in question was contracted in England, that therefore it cannot be affected by the triennial prescription, unless the debtor had resided three years in Scotland after the contraction; and as the Earl never was in Scotland from the date of the contraction till his death, that the triennial prescription therefore can only begin to run from the time of his death; in which view it is clearly interrupted by the action that was brought against the executrix in the 1763. This, with submission, seems to be founded in law, in reason, and in justice; and is perfectly consistent with the late judgement of your Lordships, that was pronounced in the case of Randal.

And it is material, in the present case, to observe, that the subject of the present dispute, not only arises from a contract executed in England, but relates to an heritable subject locally situated in England. In this view of the case, it is humbly submitted to your Lordships, if the statute 1579 will, at any rate, apply. When that statute introduced a triennial prescription of house-rents, it could only mean to relate to the rents of houses locally situated in Scotland; but it could never be understood to regulate the payment of the rents of subjects lying in another kingdom. The constitution and transmission of heritable rights must be regulated by the law of the country where the subject is locally situated. It is not sufficient, that the deed be executed agreeable to the law of the place where it is made, but it must be agreeable to the law of the place where the subject is situated; and when that is the case, it would, with submission, seem to follow, that the rents stipulated to be paid for a subject situated in England, cannot be affected by a prescription that has been introduced with respect to the rents of subjects situated in Scotland.

The defender was pleased to mention the judgement that was pronounced by your Lordships in the case of the assignees of Thomson and Tabor's bankruptcy, in order to show, that your Lordships paid no regard to the law of England in that case, but proceeded according to the rules of preference known and established in the law of Scotland.

With what propriety that case has been appealed to, is humbly

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bly submitted. No more was there found, than that a statute or decree in England is not sufficient to transfer effects not situated within the jurisdiction of England; but it is, with submission, impossible from thence to conclude, That a contract or obligation entered into in England, especially relative to an heritable subject situated in England, is not to be regulated either as to its constitution or endurance by the law of England, but by the law of Scotland. If the judgement proves any thing, it rather proves the reverse of this.

But, *2do*, The pursuer humbly apprehends, and submits it to your Lordships, that even although the debt in question had been contracted in Scotland, and had related to a subject situated in Scotland, that it would not have been affected by the triennial prescription introduced by the statute 1579; because in this case the set of the house and furniture, as well as the rent payable for the house, is sufficiently ascertained by the late Earl's writ, *viz.* the missives above recited, wrote by him to the pursuer. The missive of the 4th June 1752, contains an offer, upon the part of the Earl, and nothing was necessary to give it the effect of a written lease, than an acceptance thereof upon the part of the pursuer; and that the offer was *de facto* accepted of, and that the Earl had accordingly entered to the possession, is clearly instructed by his letter above recited of the 2d of May 1755.

This being the case, the present claim, with submission, is not liable to the triennial prescription. By the statute 1579, it is statute and ordained, " That all actions of debt for house-
" mails, mens ordinaries, servants fees, merchants counts, and
" other of the like debts, *that are not founded upon written obliga-*
" *tions*, be pursued within three years, otherwise the creditor
" shall have nae action except he either prove be writ or be
" aith of his party."

It is plain, that this statute does not respect the case of debts that are sufficiently constitute by writing. The law, after the elapse of three years, will not allow the creditor to constitute his claim by parole-evidence. The law does presume, that where the debt behoved to be ascertained by witnesses, the creditor would not allow the same to lie over, without making a demand, for above the space of three years. The creditor's silence, under such circumstances, for the space of three years, establishes a presumption of payment; which presumption can only

only be redargued by writ or oath of party: But where the creditor has no occasion to have recourse to parole-evidence, in order to constitute his claim, but where it is sufficiently constituted by writing, under the hand of the debtor, there is clearly no room for the presumption; and so the prescription will not apply.

If there had been a formal written tack betwixt the late Earl and the pursuer, there certainly would be no room for the triennial prescription: and she does, with submission, apprehend, that the foresaid missives must have all the effect of a written tack. As to the L. 150 payable for the house, it is clearly ascertained by the missives, and there was no occasion to have recourse to parole-evidence to ascertain that part of the claim: and as to the L. 50 for the use of the furniture, as the set thereof is likewise ascertained by the missives, the pursuer apprehends, that the statute is no bar to the ascertaining the extent thereof by witnesses. In the case, *Dickson contra M'Cala*, 5th July 1681, collected by Lord Stair: "A man having wrote a letter to a merchant, desiring him to furnish necessaries to his wife, and place it to his account, the pursuit here being founded upon writ, the quantities were found probable by witnesses, even after three years;" and therefore where any subject is set by writing, but the rent is left to be afterwards determined, the pursuer apprehends that the triennial prescription can be no bar to the heritor's proving, by witnesses, what is a just and adequate rent for the subject. And indeed it is humbly submitted, if a set of the use of furniture can be considered as any of the cases which falls under the statute. The statute ought to be strictly interpreted, and not to be extended to cases that are not evidently comprehended under it.

As to the statute of limitations, although it was mentioned by the defender in his first representation, yet in his second representation, he seems to have departed from that defence, and confined himself to the triennial prescription established by the statute 1579. And indeed there is not the least foundation for pleading the statute of limitations in bar of the present claim; for as the late Lord Home was beyond seas almost from the time that this debt was contracted to the day of his death, it is plain, that the exception contained in the statute of the 4th of Queen Anne, chap. 16. which provides, that the limitations should only run from the day of the debtor's return from beyond seas, prevented

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prevented the statute of limitations from taking place with respect to him ; and as to the present Earl, he hath not only been for the most part in Scotland, which, in the sense of the foresaid law, is understood to be beyond seas, but the prescription has also been clearly interrupted by the foresaid action that was brought against the executrix in the 1763.

With respect to the other defence, which at first was insisted on by the defender in this cause, *viz.* That because the heir is not liable for simple contract-debts in England, that therefore he ought not to be liable for this debt, as it was contracted in England, and he only represents his brother as heir ; the pursuer does not believe that it was seriously insisted upon, on the part of the defender ; and indeed he seemed to have departed from it in his last representation.

It must appear somewhat odd to your Lordships, that the defender, when he is pleading that the endurance of a contract entered into in England, relative to a subject situated in England, should be regulated by the law of Scotland ; that he should at the same time maintain, that the burdens to which a real estate situated in Scotland is liable to, ought to be regulated by the law of England. The pursuer, with submission, apprehends, that the very reverse of both these propositions must take place ; that the endurance of a contract entered into in England must be regulated by the law of England ; but that the burdens to which the Earl's estate in Scotland fall to be subjected, must be regulated by the law of Scotland. The law of Scotland makes no difference betwixt the debts of the defunct, but subjects the heir universally in payment of every debt to which the defunct himself is liable. The defender is not an heir in an English estate ; but he is here called as representing his brother, as heir in an estate situated in Scotland, and which he has taken up in the form, and by the rules established by the laws of Scotland ; and although by entering heir *cum beneficio*, he has not incurred an universal passive title, yet he is clearly liable for every debt that was chargeable against his brother, in whatever part of the world it may have been contracted, to the amount of the value of the estate.

In respect whereof, &c.

RO. MACQUEEN.